A

HII KING HIONG

v.

SARAWAK SECURITIES SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
ZULKEFLI MAKINUDIN JCA
RAUS SHARIF JCA
ABDULL HAMID EMBONG JCA
[CIVIL APPEAL NO: Q-02-711-2000]

C

14 FEBRUARY 2008

CIVIL PROCEDURE: *Appeal - Fresh evidence - Procedure - Grounds for admission - Whether conditions satisfied - Determining influence - Rules of the Court of Appeal 1994, r. 7(3A) - Courts of Judicature Act 1964, s. 69*

D

EVIDENCE: *Fresh or further evidence - Admission of, on appeal - Procedure - Grounds for admission - Whether conditions satisfied - Determining influence - Rules of the Court of Appeal 1994, r. 7(3A) - Courts of Judicature Act 1964, s. 69*

E

CIVIL PROCEDURE: *Amendment - Defence - Counterclaim - Fresh evidence - Whether leave to amend could not be granted because trial in action under appeal had reached final conclusion*

F

This was an application by the appellant for leave to admit fresh evidence in the appeal herein comprising of the entire oral testimonies and/or evidence as in the notes of proceedings in Kuching High Court Suit No. 22-11-98-II ('said suit') which resulted in the settlement of the action. The appellant further

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applied for leave that he be permitted to amend his defence by pleading a counterclaim against the respondent by reason of the said fresh evidence as admitted. The appellant submitted the following grounds in support of his application: (i) the fresh evidence in the said suit had the same factual basis as that on

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which the appellant was sued under Kuching High Court Suit No. 22-13-98-I, which was the action under appeal herein; (ii) the action under appeal herein was consolidated at the same hearing with three other cases involving the same plaintiff but with different defendants; (iii) in the trial of this action, the appellant

I

was barred and/or disallowed from calling certain witnesses called by the respondent and other defendants, and from cross-examining the said witnesses as they were also witnesses in other

cases consolidated under the same hearing; and (iv) the fresh evidence was never brought before the Kuching High Court's hearing of this action and if the said evidence was available, the trial judge would not have acted as he had or that judgment would have been given in favour of the appellant. The appellant also alleged that the trial judge, by consolidating the four relevant cases together, had erred in law and that this had prevented the appellant from exercising his right to apply for third party proceedings.

Held (dismissing the application)
Per Zulkefli Makinudin JCA delivering the judgment of the court:

(1) The application to admit fresh evidence before the Court of Appeal ought to be made under s. 69 of the Courts of Judicature Act 1964 and r. 7(3A) of the Rules of the Court of Appeal 1994 ('1994 Rules'). This was contrary to the appellant's contention that r. 28 of the 1994 Rules was the applicable provision. Moreover, the appellant had not shown the factual circumstances as to how the two conditions under r. 7(3A) of the 1994 Rules had been satisfied. The appellant merely alleged that he was barred or prevented by the trial judge from calling certain witness called by the plaintiff and other defendants, and from cross-examining the witnesses in the four consolidated suits. The appellant had also not shown how the fresh evidence in the form of the notes of proceedings in the said suit (which was not consolidated with the other four cases) would have a determining influence upon the decision of the High Court. *Cheow Chew Khoon v. Abdul Johari Abdul Rahman* (dist). (paras 4 & 5)

(1a) If there was any merit to the appellant's argument that he had been prevented from exercising his right to apply for third party proceedings, the appellant could still argue on this issue as a ground at the stage of the appeal herein. Nevertheless, the appellant could not use this as a valid ground to support his application to admit fresh evidence. (para 7)

A **(2)** The appellant's prayer for permission to amend his defence could not be allowed, taking into consideration the fact that the trial in the action under appeal had come to a final conclusion. (para 6)

B ***Bahasa Malaysia*** *Translation Of Headnotes*

Ini adalah permohonan perayu untuk kebenaran menerima-masuk keterangan baru di dalam rayuan di sini yang mengandungi keseluruhan keterangan dan/atau testimoni lisan yang terdapat di dalam Nota Prosiding Guaman No. 22-11-98-II Mahkamah Tinggi C Kuching ('guaman tersebut') yang membawa kepada penyelesaian tindakan. Perayu seterusnya memohon kebenaran untuk meminda pembelaannya dengan memplidkan satu tuntutan balas terhadap responden berdasarkan keterangan baru yang diterima-masuk tersebut. Bagi menyokong permohonannya, perayu mengemukakan D alasan-alasan berikut: (i) keterangan baru dalam guaman tersebut mempunyai asas fakta yang sama seperti fakta di bawah mana perayu telah disaman di bawah Guaman Sivil Mahkamah Tinggi Kuching No. 22-13-98-I, iaitu tindakan yang dirayui di sini; (ii) dalam pendengaran yang sama, tindakan yang dirayui di sini telah E disatukan dengan tiga kes lain yang melibatkan plaintif yang sama dan defendan-defendan yang berlainan; (iii) dalam perbicaraan guaman ini, perayu telah dihalang dari dan/atau tidak dibenarkan memanggil saksi-saksi tertentu yang dipanggil oleh responden dan defendan-defendan yang lain, atau menyoal balas saksi-saksi F tersebut dalam kes-kes yang disatukan di dalam pendengaran yang sama; dan (iv) keterangan baru tidak pernah dikemukakan di hadapan Mahkamah Tinggi Kuching ketika tindakan ini didengar, di mana jika ianya dikemukakan hakim bicara tidak akan bertindak sepertimana tindakannya di sini atau penghakiman akan berpihak G kepada perayu. Perayu juga berkata bahawa hakim bicara, dalam menyatukan keempat-empat kes berkenaan, telah khilaf di sisi undang-undang, dan ini menghalang perayu dari melaksanakan haknya untuk memohon Prosiding Pihak ketiga.

H **Diputuskan (menolak permohonan)**
Oleh Zulkefli Makinudin HMR menyampaikan penghakiman mahkamah:

(1) Permohonan untuk menerima-masuk keterangan baru di I hadapan Mahkamah Rayuan harus dibuat di bawah s. 69 Akta Mahkamah Kehakiman 1964 dan k. 7(3A) Kaedah-Kaedah Mahkamah Rayuan 1994 ('Kaedah 1994'). Ini

bertentangan dengan hujah perayu bahawa peruntukan yang terpakai adalah k. 28 Kaedah 1994. Selain itu, perayu tidak membuktikan halkeadaan fakta bagaimana kedua-dua syarat di bawah k. 7(3A) Kaedah 1994 telah dipenuhi. Perayu hanya mendakwa bahawa beliau dilarang atau dihalang oleh hakim bicara dari memanggil saksi-saksi tertentu yang telah dipanggil oleh plaintif dan defendan-defendan lain, dan dari menyoal balas saksi-saksi dalam keempat-empat guaman yang disatukan. Perayu juga tidak menunjukkan bagaimana keterangan baru dalam bentuk Nota Prosiding di dalam guaman tersebut (yang disatukan dengan empat kes lain) mempunyai pengaruh muktamad ke atas keputusan Mahkamah Tinggi. *Cheow Chew Khoon v. Abdul Johari Abdul Rahman* (dibezakan).

(1a) Jika wujud merit pada hujah perayu bahawa beliau dihalang dari melaksanakan haknya untuk memohon Prosiding Pihak Ketiga, perayu masih boleh berhujah atas isu ini sebagai satu alasan di peringkat rayuan di sini. Perayu, bagaimanapun, tidak boleh menggunakan ini sebagai alasan sah bagi menyokong permohonannya untuk menerima-masuk keterangan baru.

(2) Permohonan perayu untuk kebenaran untuk meminda pembelaannya tidak boleh dibenarkan, mengambilkira fakta bahawa perbicaraan di dalam tindakan yang dirayui telah sampai ke penghujungnya yang muktamad.

Case(s) referred to:
Cheow Chew Khoon v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 CA ***(dist)***

Legislation referred to:
Courts of Judicature Act 1964, s. 69
Rules of the Court of Appeal 1994, rr. 7(3A), 21, 28

For the appellant - Tai Choi Yu; M/s Tai Choi Yu & Co
For the respondent - Tony Ling; M/s HC Lee & Partners

[Appeal from High Court, Kuching; Civil Suit No: 22-13-98-I]

Reported by Suresh Nathan

JUDGMENT

Zulkefli Makinudin JCA:

[1] This is the appellant's ("the defendant in the court below") application by way of notice of motion in encl. (13a) for leave to admit fresh evidence in the appeal herein comprising of the entire oral testimonies and/or evidence as in the notes of proceedings in Kuching High Court Suit No. 22-11-98-II between *Sarawak Securities Sdn. Bhd. v. Ting Eng Eng & Hii King Hiong; Daniel Wong Jit Kiang, as third party; and Jacqueline Ngu (f)*, as fourth party; that took place between 14 November 2005 to 4 December 2006 which resulted in the settlement of the action. The appellant further applies for leave that he be permitted to amend his defence by pleading a counterclaim against the respondent ("the plaintiff in the court below") by reason of the said fresh evidence as admitted.

[2] The appellant in his affidavit in support of the application *inter alia* stated the following grounds:

(1) The fresh evidence in the aforesaid Kuching High Court Suit No. 22-11-98-II has the same factual basis as that on which the appellant was sued under the Kuching High Court Suit No. 22-13-98-I, which is the action under appeal herein.

(2) The action under appeal herein was consolidated at the same hearing with three other cases involving the same plaintiff but with different defendants.

(3) In the trial of this action in the Kuching High Court the appellant was barred and/or disallowed to call certain witnesses called by the respondent and other defendants and from cross-examining the said witnesses as they were also witnesses in other cases consolidated under the same hearing.

(4) The fresh evidence was never brought before the Kuching High Court's hearing of this action and if the said evidence was available, the said trial judge would not have acted as he had or that judgment would not have been given against the appellant but rather in favour of the appellant.

[3] We heard this application on 30 July 2007 and we were unanimous in our decision dismissing the application. We now give the reasons for our decision as follows:

[4] Learned counsel for the appellant in his argument before us submitted that the application to admit fresh evidence is made under r. 28 of the Rules of the Court of Appeal 1994 ("the 1994 Rules"). He further submitted that the appellant's application if allowed will require consequential amendment of the record of appeal which is made under and by virtue of r. 21 of the 1994 Rules. The case of *Cheow Chew Khoon @ Teoh Chew Khoon v. Abdul Johari bin Abdul Rahman* [1995] 4 CLJ 127 was cited as an authority for the appellant to support such a contention. Contrary to the contention of learned counsel for the appellant, it is our considered view the application to admit fresh evidence before the Court of Appeal is to be made under the provisions of s. 69 of the Courts of Judicature Act and r. 7(3A) of the 1994 Rules wherein new or fresh evidence may be admitted during the hearing of the appeal provided two conditions are fulfilled which are as follows:

(a) At the hearing before the High Court the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and

(b) The new evidence if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court.

[5] We do not find the case of *Cheow Chew Khoon @ Teoh Chew Khoon v. Abdul Johari bin Abdul Rahman (supra)* cited by the appellant is relevant here because that case did not deal at all with the issue of admission of fresh evidence. Moreover in the affidavit in support of the appellant's application the appellant has not shown the factual circumstances as to how the two conditions under r. 7(3A) of the 1994 Rules have been satisfied. The appellant merely alleged that his counsel was barred or prevented by the trial judge to call certain witnesses called by the plaintiff and other defendants and from cross-examining the witnesses in the said four consolidated suits. The appellant has also not shown how the fresh evidence in the form of the notes of proceedings in Suit No. 22-11-98-II which was not consolidated with the other four cases sought to be admitted as evidence would have a determining influence upon the decision of the High Court.

[6] In one of the prayers under the application to admit fresh evidence the appellant had also sought for an order that he be permitted to amend his defence by pleading a counterclaim against the respondent by reason of the said fresh evidence as admitted. We do not think this prayer can be allowed taking into consideration the fact that the trial in the action under appeal herein had come to a final conclusion.

[7] The appellant has also alleged in support of his application to admit fresh evidence that by consolidating the four cases together the trial judge had made an error in law in civil procedure and that this had prevented his counsel from exercising his right to apply for third party proceeding under the Rules of the High Court 1980. On this point we find if at all there is merit in this argument the appellant could still argue on this issue as a ground at the stage of the appeal herein. Nevertheless the appellant cannot use this as a valid ground to support his application to admit fresh evidence.

[8] For the reasons above stated, we dismissed the appellant's application in encl. (13a) with costs.